No. 3076

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN MANGANESE STEEL COMPANY, a Corporation, *Appellant,*

vs.

ALASKA MINES CORPORATION, a Corporation, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, SECOND DIVISION.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT.

Appellant's statement of the case consists principally of an almost *verbatim* statement of the allegations of its complaint in the case, using for that purpose, eleven of the fifteen pages of its brief covering its statement. It dismisses appellee's answer to the complaint, covering fourteen pages of the transcript of record, with a ten-line statement, and it covers the

balance of the 259 pages of the transcript of record in a little over three pages of its brief. None of the contents, nor even the substance of the numerous affidavits filed by appellee in opposition to the motion for a receiver, pendente lite, is given in the statement, and very little thereof is even referred to anywhere in the brief, although the decision of the lower court was based upon the showing made by these affidavits, together with the denials in appellee's answer, and we believe this court will base its decision on this appeal upon the same showing.

It will be necessary for us to refer at length in our argument to these affidavits, and we will not, therefore, state their contents at this time; but we wish, however, before making our argument, to call the court's attention to some very material matters, bearing upon this appeal, which appear, either affirmatively or by omission, from the record here.

In the first place, this is a suit by an *alleged* creditor of a prior owner of the property in question, to impress upon that property an alleged equitable lien, for the purpose of having such lien satisfied out of this property, unless appellee should see fit to pay such alleged claim, to prevent a sale of its property. This is not a suit involving either the title to, nor right to possession of, any of this property. So far as this suit is concerned, appellee's title to this property, and its

right to possession of all thereof, is perfect as against the world, including appellee, until and unless appellant establishes its right to a lien thereon, and appellee refuses to pay such lien, so that a sale of the property becomes necessary; except, of course, that the court may, upon a proper showing of necessity, take the possession of the property from appellee for the sole purpose of preserving the property from loss, damage or waste, which would prevent appellant from securing payment of its lien, if any, when established.

In the next place, it must be remembered that none of the defendants, other than the Alaska Mines Corporation, sole owner and in sole possession of the property in question, is a party to this appeal. Appellant, in its brief, repeatedly refers to other of the defendants in the action as "appellees," but this is incorrect. None of the other defendants is alleged to have any interest in the property appellant asks a receiver for; and neither of these other defendants has any interest in whether or not such a receiver is appointed. They were, therefore, not proper nor necessary parties to the appeal, and were not made such parties by appellant. Neither of the other defendants appeared nor made any showing in opposition to the application for a receiver in the lower court (Tr. p. 46). The citation on appeal was directed only to defendant Alaska Mines Corporation (Tr. p. 256); and

the appeal bond ran only to the Alaska Mines Corporation (Tr. p. 246). For this reason, it is not proper for this court to consider or pass upon questions which may be involved upon the trial of this action, which affect other of the defendants, but which are not necessary to be determined as to the Alaska Mines Corporation, sole appellee here, alone. Most of the questions discussed by appellant in its brief affect other of the defendants in the action, especially those against whom it prays a personal judgment (Tr. p. 17); and they have little, and, as we believe and will argue, no bearing upon the questions involved at this time.

Further, it will be noted that this action is not brought by or for the benefit of any other alleged creditor, nor any stockholder of the Nome Consolidated Dredging Co., nor is a general receiver of either defendant asked for, but only a receiver for the particular property in question, and such a receiver would be for appellant's benefit only.

So far as appears from the record here, there are no creditors of the Nome Consolidated Dredging Co. other than appellant's alleged claim; nor does the record show there were any stockholders of that company other than those secured by the two mortgages in question; nor, if there were any other such stockholders, that any of them have ever made any complaint about the mortgages or the foreclosure and transfers in ques-

tion. While appellant appears very solicitous of the rights of "the worried creditors and deluded stockholders" who "stalked the earth looking for justice" (Brief pp. 32-33), and repeatedly refers to the *other* creditors and stockholders, who it alleges were also defrauded through the deep laid scheme and conspiracy appellant pretends to find from the record here, nevertheless, no one else claiming to be a creditor of the Nome Consolidated Dredging Company, or a stockholder thereof, has "stalked" into court to obtain any redress for these alleged terrible wrongs; and appellant can claim no benefit for itself as a champion for the rights of others whom it has not shown exist. It can be presumed that no such other creditors or injured stockholders exist, or appellant would have succeeded in securing their active assistance in this suit.

Another fact must be kept in mind on this appeal, that the issues of indebtedness, fraud, preference, notice and bona fides have not yet been tried nor determined. This is not an appeal from a final judgment, with findings of fact made, or evidence offered upon which findings of fact could be made, upon these issues; nor can appellant by repeating its claim of fraud, change mere allegations, expressly denied, into findings of fact or proof thereof. But the lower court was bound to take the disputed issues of fact, determine only those bearing on the necessity for the ap-

pointment of a receiver of appellee's property before trial, and from these and the admitted facts, render its judgment upon appellant's motion for a receiver; and this court in reviewing that judgment will do likewise, without deciding any issue of fact which is disputed in the record, except only those bearing upon the necessity for a receiver before trial, no matter how strongly it might be impressed with the possible truth of any disputed allegation. This applies to the first two subdivisions of the questions of fact as made by appellant on page 19 of its brief, and to practically all of the references to the record made by appellant, in support of its contentions under these two subdivisions. The issues of fraud and notice are in sharp dispute in the pleadings in the case, and most of the references to the record which appellant makes to support its contentions as to these two issues, are either explained or denied by other portions of the record not referred to by appellant, so that the court cannot, at this time, nor on this record, pass upon these issues; but, in passing upon the order under review, this court must treat these issues as though unproven, and therefore, as untrue. We will refer to many of these matters later in our argument, and will not lengthen this brief by further reference to them at this time.

Another thing should be borne in mind, that appellant claims there are four mortgages upon the property in question. Appellee claims that three of these

mortgages have been paid. But, whether there are one or four existing mortgages, the fact is neither of these mortgagees is a party to this action, nor to this appeal, although the appointment of a receiver for the property would affect the possession of the mortgagor, and thereby the security of the mortgagees, without their having had an opportunity to defend against such action.

We have made this general statement so that the court may not lose sight of the material and vital issues upon this appeal, because of the statements in appellant's brief of what it claims are facts, but which are only statements of disputed issues of fact, nor because of its long argument of issues, disputed and not yet supported by evidence, while it almost ignores the real issues here involved.

POINTS OF LAW AND FACT TO BE DISCUSSED.

Appellee will argue the following points of law and fact, although it will contend that only the first three and seventh points are necessary to be considered upon this appeal, to-wit:

1. The court had no authority, under the law applicable to this case, and the record herein, to appoint a receiver, pendente lite of appellee's property.

2. Even if the court had such authority, the record is insufficient to justify such appointment.

3. If the record is sufficient to justify such appointment, the lower court did not abuse its discretion in refusing to do so, as no necessity therefor is shown.

4. The mortgages in question were bona fide; but in any event, the court cannot find upon the record here that they were fraudulent.

5. The stockholders and directors of the Nome Consolidated Dredging Company had a legal right to secure themselves by these mortgages, as against appellant; but in any event, the record is insufficient to warrant a decision upon this appeal that such security was void as to appellant.

6. Appellee is a bona fide purchaser for value of the property in question, without notice of appellant's alleged claim; but in any event, the record is insufficient to warrant a contrary decision upon this appeal.

7. Appellant could have ample protection by notice of lis pendens.

ARGUMENT.

NO LEGAL AUTHORITY FOR APPOINTMENT OF RECEIVER.

Section 1585 of the Code of Civil Procedure of Alaska, 1913, provides:

> "A receiver may be appointed in any civil action or proceeding, other than an action for the recovery of specific personal property—
>
> "First. Provisionally, before judgment, on the application of either party, when his right to the property which is the subject of the action or proceeding, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired;
>
> "Second. After judgment, to carry the same into effect;
>
> "Third. To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the debtor refuses to apply his property in satisfaction of the judgment;
>
> "Fourth. In cases provided in this code, or by other statutes, when a corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights:
>
> "Fifth. In the cases when a debtor has been declared insolvent."

The first subdivision of this section does not cover this case, because appellant does not claim any "right to the property;" but only a lien thereon. The purpose of this provision is to preserve the property where necessary, when a party out of possession claims own-

ership and right of possession thereof as against the party in possession, who is wasting the same or its rents and profits. The second subdivision of the section, of course, has no application. The third subdivision does not cover this case at the present time, because no judgment has been entered, no appeal from a judgment taken and no execution issued, in this case. Neither is it claimed that the appellee here is "the debtor" of appellant.

The fourth subdivision has no application, because it applies only to *debtor* corporations, and, in any event, appellee has not been dissolved, nor does appellant allege that it is insolvent or in danger of insolvency, nor that it has forfeited its corporate rights. And this subdivision applies only to *receivers for corporations*, not to *receivers for property* in the possession of third parties, upon which a party claims only a lien. This is also true of the fifth subdivision of the section, which, therefore, has no application here.

Appellant, on page 53 of its brief, refers to this statute, but states that a party is entitled to a receiver when he shows that he has a probable *"right or interest in* the property or fund;" but the statute does not give him such right when he merely has *an interest* in the property, much less when he only claims an equitable lien thereon, which is neither *a right to nor interest in* the property. And even if, under this stat-

ute, a party might be entitled to a receiver, *after judgment* establishing his alleged equitable lien, this would not entitle such party to a receiver *before judgment,* where no "right to" the property was even claimed. Appellant cites no authorities in support of its contention on this question, which apply under a statute worded as this is; and we believe that the statute, not general equitable principles, controls here. It is appellee's claim, therefore, that the court had no power to grant appellant's petition for the appointment of a receiver, pendente lite, of appellee's property in this case, because no such power is given by the code governing such appointments.

RECORD INSUFFICIENT TO JUSTIFY APPOINTMENT. IN ANY EVENT, NO ABUSE OF DISCRETION SHOWN

Our points 2 and 3 are so closely connected that they can best be discussed together, the same evidence and rules of law applying to both.

In our opinion, this court not only will not, but should not, consider any questions of either law or fact upon this appeal, except the question of power under the statute already mentioned, other than whether or not the record is sufficient to have justified the lower court in granting the motion for the appointment of a receiver, pendente lite, and, if so, whether

or not it abused its discretion in not granting such motion. If, *for any reason whatever,* the record is insufficient to justify the appointment, of course, the order appealed from must be affirmed; and, even if the record is sufficient, so that such an appointment would have been affirmed, or this court, if sitting as a court of first instance, would have made the appointment, nevertheless, under the settled rules of law, this court will not reverse the decision of the lower court on the motion, unless that court clearly abused its discretion in the matter.

Appellant appears to appreciate the force of our contention in this regard, as its argument is based almost entirely on questions of fact in sharp dispute, and is directed to questions of law related thereto, which are not necessary to a decision on this appeal, nor, in our opinion, even proper to be considered now, but which appellant apparently hopes to have this court decide before trial, so as to control the lower court in its decision upon the trial. However, we do not think this court will undertake to decide any disputed questions of fact not necessary to be decided now, from a record containing only pleadings and affidavits; nor will it now lay down any rules of law for the guidance of the trial court upon the trial of the case, when it is not necessary to do so in passing upon the questions now involved, and all parties to be affected thereby are not before this court.

We think this court, at this time, will do as the lower court did, consider only *the necessity* for a temporary receiver, as shown by the record "without expressing any opinion on the questions of fraud, conspiracy and notice thereof to defendant alleged and involved in this case." (Tr. pp. 240-241.)

As already stated, appellant does not claim to be the owner, nor entitled to the possession, of any of the property for which it asks a receiver. Appellant alleges facts showing that appellee is the legal owner and in possession of all of such property. Appellant's only claim is that it is entitled to a lien upon this property, for the payment of its claim against a prior owner of the property. If appellant should establish this alleged lien, all it is interested in is that its claim be paid, either out of the property or by appellee, or by one or more of the other defendants in this action, who would be liable for the claim. The only reason for appointing a receiver for the property, pending a trial on the merits, would be that *none of the defendants* is able to pay the claim, if appellant should prevail at the trial; that appellant could only secure payment out of this property, and that appellee is likely to waste or destroy the property before a trial can be had on the merits, so that appellant would be unable to collect its claim, unless a receiver be appointed to preserve the property from waste or destruction pending the suit.

If appellant should prevail at the trial, and the court then held that it was entitled to payment of its claim out of this property, judgment would be entered against the defendants committing the alleged fraud, and making it a lien upon the property, thereby compelling appellee to either pay the claim or have the property sold, unless it was paid by the other defendants who would be primarily liable therefor; and the court could then, if necessary, under the express terms of the code, appoint a receiver for the property to preserve it until the claim was paid or the property sold. If appellee took an appeal from such judgment, it would be compelled to give a supersedeas bond to pay the judgment, if affirmed, or the property would be sold.

It is clear, therefore, that appellant was not entitled, in any event, to a receiver pendente lite, unless it made a clear showing that it would probably prevail at the trial against appellee, and that it would be unable to collect its claim, unless such receiver was appointed. Unless the record here shows *both* these facts so clearly that the lower court not only would have been justified in making such appointment, but abused its discretion in not doing so, the order appealed from must be affirmed, regardless of what the court may find the law or facts to be on the trial, relative to the alleged fraud, conspiracy or notice thereof, or

what it may feel from the present record, the finding on the trial on these questions may be.

The foregoing contention is amply sustained by authority.

This court has laid down the general rule under the general equitable powers of the court governing the appointment of receivers, pendente lite, as follows:

> "To warrant the interposition of a court of equity by the aid of a receiver, it is essential that plaintiff should show, first, either a clear, legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand; and, secondly, it must appear that possession of the property was obtained by defendant through fraud, or that the property itself, or the income from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant. High on Receivers (2nd Ed.) Sec. 11. See also 23 Am. & Eng. Encl. of Law, 1036."
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> *International Trust Co. v. Decker Bros.*, 152 Fed. 82.

It is clear that, in speaking of obtaining *possession* of the property "through fraud," the court refers to those cases where plaintiff claims the right to such possession, which possession defendant obtained fraudulently as to plaintiff. In this case, appellant never had any right to *possession* of the property in question, and appellee's possession thereof is valid as against the world, including appellant, and is not fraudulent, even

though it should be held upon the trial that appellee's *title* to the property is subject to appellant's right to a lien thereon.

In a creditor's suit, therefore, under the rule laid down in this case, the plaintiff, in order to be entitled to a receiver of the property of the defendant, must show *clearly* "that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand," and he must also show "that the property itself, or the income from it, is in danger of loss from neglect, waste, misconduct or insolvency of the defendant." It is not enough that a plaintiff in such case show one only of these conditions, he must show both, first,—that he has a right to recover, and, second,—that he will be unable to obtain payment of his claim after judgment, unless the property be preserved through a receiver, pending the suit.

In the case of *Moore v. Bank of British Columbia*, 106 Fed. 574, his Honor, Judge Morrow, sitting in the Circuit Court, refused to appoint a receiver, *pendente lite*, saying:

> "The appointment of a receiver is, as a general rule, discretionary with the court, but this discretion is not arbitrary or absolute, but it is a sound judicial discretion, which takes into account all the circumstances of the case, and is exercised for the purpose of protecting the rights of all the parties to the action and in the property in controversy. 3 *Pom. Eq. Jur.* 1331. In the present case the question whether a receiver should

be appointed involves the inquiry (1) whether the property, if left in the hands of the present holder, is in any danger; and (2) whether there is a reasonable probability that the complainant will ultimately prevail in the action."

This case was cited with approval by the Circuit Court of Appeals of the 8th Circuit, where it is said:

"A court of equity is not without jurisdiction to appoint a receiver of real estate and of its proceeds in the possession of a defendant holding under a title regular on its face. But the cases in which it may exercise that power before a trial of the issues on the merits without a departure from the established principles and practice of equity jurisprudence are exceptions to the general rule, and clear proof of the following necessary facts is indispensable to bring such a case within the exceptions:

First: The fact that there is imminent danger that unless a receiver is appointed the property or its proceeds will be deteriorated in value or wasted during the pendency of the suit.

Second: The fact that the plaintiff will suffer irreparable loss from such deterioration or waste. But if the defendant is solvent and abundantly able to respond to any such loss, or if he will give a good bond so to respond, the loss can rarely be irreparable, and the general rule is that a receiver should not be appointed.

Third: The fact that on the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately prevail on the merits.

But courts of equity are extremely averse to any interference with the possession of a defendant claiming real estate under a legal title. They proceed in such case with extreme caution and rarely interfere. If it seems doubtful whether or not the plaintiff will recover at the final hearing, or

> whether or not there is imminent danger that the plaintiff will suffer irreparable loss, the application for a receiver will be denied and in the hearing and in the decision of such a case all the presumptions are in favor of the defendant in possession under a legal title. A court of equity is sedulous to prevent the successful invocation of its interlocutory injunction, or its appointment of a receiver to perform the function of a successful action of ejectment, and at the same time to avoid the trial of titles indispensable to such an action." (Citing authorities.)
>
> *Folk v. U. S.*, 233 Fed. (CCA8th) 183.

The majority of this court sustained the appointment of a receiver, *pendente lite*, in the case of *Heinze v. Mining Co.*, 126 Fed. 11, but recognized the rule that such appointment was discretionary with the lower court, saying:

> "An appellate court will not reverse the order of a lower court in appointing a receiver or in directing his action, unless it appears that the discretionary power of the court 'has been so improvidently and improperly exercised as to bring its action clearly within the meaning of the term 'abuse of power.' "

However, his Honor, Judge Ross, dissented and cited among other cases the Moore case above referred to, saying:

> "Of course, there may be, and sometimes are, cases where the proper preservation of the property requires the appointment of a receiver, who may, when the necessities of the case require it, be authorized to operate the property. But the in-

stances are rare, and that a strong showing must be made, is well established."

The following authorities are to the same effect:

"To justify the appointment of a receiver to conserve property in controversy, *pendente lite,* it should be made to appear: (1) That the applicant therefor has a probable right to or interest therein; and (2) that such property or its rents or profits are in danger of being lost or materially injured or impaired; and further, (3) that the interest of one or both parties will be promoted by such apointment and the substantial rights of neither impaired; and (4) that the order will be best for all concerned. Section 3822 Code. Courts are reluctant in interfering with the possession of property though in controversy, especially when such possession is that of the party having legal title, and will not do so through the appointment of a receiver in the absence of a showing of a probability that the applicant will be entitled to a decree on final hearing." (Citing authorities.)

If upon the entire record this is a matter of much doubt the application will be denied. (Citing authorities.)

Thomas v. Timonds, 159 N. W. (Ia.) 882.

"The appointment of a receiver of any kind is a very severe blow to any corporation. It impairs its credit, interferes with its management, and imposes upon the court the onerous duty of corporate management, which it is not qualified to perform, and which it should not undertake except in extreme cases."

Shera v. Carbon Steel Co., 245 Fed. (D. C.) 590.

"As against a defendant in possession and enjoyment of property which is the subject mat-

ter of the litigation equity always proceeds with extreme caution in appointing a receiver."

High on Receivers, Sec. 19.

"The high prerogative act of taking property out of the hands of one and putting it on pound, under the order of a judge, ought not to be taken, except to prevent manifest wrong immediately pending."

Crawford v. Ross, 39 Ga. 44.

"The power to appoint a receiver is a delicate one, especially when invoked upon interlocutory *ex parte* applications, and should be exercised with extreme caution, and only under circumstances requiring summary relief or when the court is satisfied that there is imminent danger of loss, lest the injury thereby caused be far greater than the injury sought to be averted. It should never be exercised in a doubtful case."

34 *Cyc.* p. 21-22.

"The court reluctantly interferes against the legal title and then only in case of fraud clearly proved and of imminent danger and when the matter in dispute depends upon the legal title a receiver will not be appointed except in a strong case shown."

34 *Cyc.* 48.

"The grounds upon which the court will exercise its jurisdiction to appoint a receiver are that there is a reasonable probability of success on the part of plaintiff and that the property involved is in danger. While plaintiff must show his title where the rights involved depend upon title, if title or the probability of success is not shown, insolvency alone will not be sufficient; on the other hand such title or probability of ultimate success will not be sufficient to disturb a possession under claim of right unless the property is in danger of

loss or destruction, or the rents and profits are in danger of loss by reason of the insolvency of the party in possession."

34 *Cyc.* 54-55.

"Where there is no general ground for apprehension of loss or danger of injury to the property by leaving it to remain in the occupancy of him who has the use of it, and whose solvency is not questioned, a receiver will not be appointed."

34 *Cyc.* 58.
110 *Pac.* 598.

"The exercise of the extraordinary power of a chancellor in appointing a receiver, or in granting writs of injunction or *ne exeat* is an exceedingly delicate and responsible duty to be discharged by the court with the utmost caution, and only under such special or peculiar circumstances as demand summary relief. It is a peremptory measure, whose effect, temporarily, at least, is to deprive a defendant in possession of his property before a final judgment or decree is reached by the court, determining the rights of the parties, and since it is a serious interference with the rights of the citizen without the verdict of a jury, and before a regular hearing, it should only be granted for the prevention of manifest wrong and injury. The principal grounds upon which courts of equity grant their extraordinary aid by the appointment of receivers *pendente lite* are that the person seeking the relief has shown at least a probable interest in the property, and that there is danger of its being lost unless a receiver is allowed; the element of danger being an important consideration in the case, a remote or past danger will not suffice as a ground for the relief, but there must be a well-grounded apprehension of immediate injury (citing cases). The court will not act upon a possible danger only. The danger must be great and imminent, and demanding immediate relief * * * . It is the duty of the

court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties; and it ought not to interpose unless it is satisfied that the property is being mismanaged and in danger of being lost, or that it is in possession of an insolvent or unfit trustee."

Lancaster v. Asheville St. Ry Co., 90 Fed. 129 (C. C. N. C.).

"The power to appoint a receiver and sequester property will be exercised with great caution, and only where it appears that without it plaintiff will sustain irreparable loss."

Hayes v. Jasper Land Co., 41 So. 909, 147 Ala. 340.

"It is a well established rule that the plaintiff, the equities of whose bill have been fully met and denied, is not entitled to the appointment of a receiver, unless he overcomes the denials in such answer by further proof in support of his bill. In other words, where the equities of plaintiff's bill have been fully met and denied by a sworn answer on behalf of the defendant, the court has no discretion, and its appointment of a receiver in such case is unauthorized." (citing cases.)

Sweeny v. Mayhew, 56 Pac. (Idaho) 86.

"Where a bill against one who has conveyed property to certain preferred creditors does not aver that the preferred creditors are insolvent, it does not justify the appointment of a receiver."

Lehman-Durr Co. v. Griel Bros. Co., 24 So. 49, 119 Ala. 262.

"Appointments of receivers to take charge of real property should never be made until the moving party shows himself clearly entitled thereto. It is not the policy of courts of equity to take charge of real estate and manage and control it through the aid of a receiver as against the party

in possession asserting title in himself, unless it is shown to be in imminent danger of great waste or irreparable injury."

Kelly v. Steele, 72 Pac. (Id.) 887.

In the case of *Whitley v. Bradley,* 110 Pac. 596, the Court said:

> "Equitable relief by way of the appointment of a receiver will be invoked only where the exigencies of the case clearly appear to absolutely require it for the conservation of the rights of all the parties concerned in the litigation giving rise to the application for such relief. The appointment of a receiver is justly regarded as an extraordinary or harsh remedy, and a court of equity will never exercise its discretion favorably to a motion invoking the aid of this remedy except upon a satisfactory showing that such relief is necessary in order to preserve and fully protect the rights of all the parties. * * * It must, of course, be made to appear that the person seeking such relief has at least a probable right or interest in the property or fund involved in the litigation, and that there is danger of its being lost or destroyed or misappropriated unless a receiver be appointed *pendente lite.*"

None of the authorities cited by appellant state any rule in conflict with these authorities.

We will now examine the record on this appeal to see if it is sufficient to require the appointment of a receiver, *pendente lite,* in this case, or even to justify such an appointment, or show that the trial court abused its discretion in refusing to do so.

The first thing appellant was bound to allege and

clearly establish, was a debt due from the former owner of the property in question, from which appellee acquired title. This being a creditor's suit, appellant was, of course, bound to allege and prove that its debt existed at the time of the alleged fraudulent execution of the mortgages, to wit, September 14th, 1914. Appellant alleged the existence of such a debt in paragraph II of its complaint in this action; it also alleged the recovery of judgment therefor in the Court of Common Pleas of Philadelphia on June 8, 1916, long after the execution of the mortgages and their foreclosure. Appellant also alleged the recovery of judgment in the court at Nome on the alleged judgment in the Philadelphia Court, and return of execution on the Nome judgment *nulla bona*, and insolvency of the alleged judgment debtor, the Nome Consolidated Dredging Co. (Tr. pp. 3-4.)

Each and all of these allegations were denied in appellee's answer (Tr. pp. 144-145). Appellant did not offer any evidence upon the hearing of the application for a receiver, to support these allegations of its complaint, except that Mr. Powell testified in his deposition, taken by appellant, that he personally appeared at the trial of a suit in the Court of Common Pleas in the City of Philadelphia, between appellant and the Nome Consolidated Dredging Co.; that he testified at the trial of said action, which was commenced in 1914;

and that the notes involved in that suit were executed by him as general manager of the Nome Consolidated Dredging Company (Tr. pp. 136, 137). He did not testify what time in 1914 this suit was commenced, nor which party commenced it, nor what questions concerning the notes were involved.

If appellant does not prove the allegations of its complaint, which are denied by appellee, relative to the existence of the alleged debt from the Nome Consolidated Dredging Co. to appellant, then it will fail to show that it is entitled to any "lien upon" the property in question, or that such property "constitutes a special fund out of which it is entitled to satisfaction" of any claim, and, therefore, it would not be entitled to recover in this action. And certainly the court cannot say from the record herein that appellant has so *clearly shown* that it had or has such a claim, that the lower court abused its discretion in refusing a receiver, pendente lite.

On the question of the *necessity* for a receiver, pendente lite, appellant made practically no showing whatever in support of its application for a temporary receiver; while on the other hand appellee not only denied all allegations of the complaint touching this question, but also offered a large amount of testimony upon the hearing to show that there was absolutely no necessity whatever for the appointment of a re-

ceiver before trial, nor the slightest danger, if appellant should prevail at the trial, that it would be unable to collect its judgment, if a receiver, pendente lite, was not appointed.

As before stated, this is not a suit involving either the title or right to possession of the property in question. Appellant does not claim either, but admits by its pleadings and proofs that appellee has and is entitled to both; except that appellant claims that appellee's title is subject to appellant's right to satisfy its alleged claim against a prior owner of the property out of the same, unless appellee or some of the other defendants, pay such claim to save the property from sale.

There is no question but that the property is worth many times the amount of appellant's alleged claim, and there is no serious claim that the property, over and above all other liens thereon, is not worth many times the amount of such claim. Appellant does not allege that appellee or either of the defendants it alleges committed the fraud, was or is insolvent; nor did it offer any evidence on the hearing to show that appellee or the other defendants who would be primarily liable for the claim, are not amply able to pay any judgment appellant might obtain or establish as a lien against the property, or to pay for any waste or damage appellee might commit or do to the property, pending the

suit, which would make it impossible for appellant to collect its alleged claim, if and when established. For this reason, under the well recognized rule in such cases, appellant wholly failed to show any right to have the court take the possession of appellee's property away from it, through a receiver, prior to the trial of the action.

Appellant did allege generally in its complaint that appellee, after taking possession of the property, began to use the same in conducting mining operations on the mining claims; that these claims would be worthless when the gold was mined therefrom, and that the machinery and equipment was being worn and depreciated "and in time will be rendered valueless;" also that appellee threatens to dispose of the property. (Tr. pp. 14-15.) But appellant did not allege to what extent appellee had extracted gold from the mining claims or would or could do so before this case could be tried on its merits; nor did it allege that the use appellee was making of the machinery and equipment would render it valueless, nor even materially depreciate its value, before such trial.

In support of its motion for a receiver, appellant filed the affidavit of Mr. Gilmore, one of its attorneys herein, in which the general statement was made that, unless a receiver was appointed to take possession and control of the property, the same would be dissipated,

squandered and rendered of no value (Tr. pp. 40-42); but this was a mere conclusion, and no facts to support it were stated in the affidavit.

Appellant also offered in support of its motion for a receiver the deposition of defendant E. E. Powell, in which he testified, among other things, that at the time the deposition was taken, to wit, September 5, 1917, appellee was operating two dredges on two of the mining claims involved in this action; and was using power for these dredges from the power plant involved; also that appellee was about to complete another dredge which it expected to operate very soon; that it was appellee's intention to operate all three dredges and mine as rapidly as possible; that it might not be able to operate the third dredge before the close of the mining season that fall, but that it intended to operate the other two dredges the remainder of the season, and that appellee intended to appropriate all gold taken in such mining operations. (Tr. pp. 134-135.)

This witness was not asked, and did not testify as to how much of the ground in question could be mined by these two dredges before the close of the mining season, nor whether such mining operations were in pay dirt or only doing preparatory work, nor as to how much gold had been or would likely be taken

from these claims before this case could be reached for trial in the summer of 1918.

In its brief appellant states that, "The record also shows that about the only valuable placer claim owned by the Nome Consolidated Dredging Company at the time the assets were taken was the Carnation Group, upon which the Alaska Mines Corportaion is now engaged in mining and extracting the gold and appropriating it to its own use." (Brief p. 55); also that "The Court must also conclude from the record that the use of the power plant, running at its maximum capacity for a year or two, pending this litigation, will render the said power plant worthless; that the gold from the said Carnation Group placer claim will have been mined out and appropriated by the Alaska Mines Corporation under the control of the said schemers." (Brief. p. 58.)

No reference is made to the record to support these statements, and there is not only nothing in the record to sustain them, but the statements are erroneous in fact.

In rebuttal, appellant offered the affidavit of one William M. Eddy to the following effect:

That on August 22, 1917, he went to the location of one of the dredges involved in this suit, known as the Wonder Creek dredge, and found that it had been dismantled during the previous summer, many parts

taken and removed and the balance scattered and left unprotected. That thereafter he went to another dredge, known as the Flat Creek dredge, and was there informed that appellee had dismantled the Wonder Creek dredge and taken parts for use and construction of the Flat Creek dredge. That thereafter he inspected the dredge known as the Bourbon Creek dredge and also inspected the power plant and observed that appellee was operating the power plant and was using and operating the Bourbon Creek dredge and digging placer ground and extracting gold therefrom with this dredge. That he also observed that the Flat Creek dredge had been mining on one of the claims in controversy. That appellee was then actively engaged in digging and extracting gold from the two claims upon which these two dredges were being operated. That these dredges are of large capacity, readily operated, and would, in a few weeks, dredge the valuable pay ground contained in these two claims, and render them valueless. He also stated that appellee was finishing and equipping what was known as the Greenberg or Bessie dredge, and that appellee intended to operate that dredge by power from the power plant. And he further stated that if the power plant was used to furnish power for the three large dredges it would be driven to its maximum capacity and would result in great damage and deterioration thereto. (Tr. pp. 233-235.)

This was all the showing made by appellant to sustain the burden upon it on this motion, of establishing "that the property itself, or the income from it, is in danger of loss from the neglect, waste or misconduct" of appellee.

On the other hand appellee in its answer expressly denied that it had extracted any considerable part of the gold from the mining claims upon which these dredges were being operated, and it expressly denied that the use it was making of the machinery and equipment in controversy, would wear or depreciate it or render it valueless, but alleged, on the contrary, that it had spent large sums of money, far in excess of appellant's said claim, in repairing said machinery and equipment and putting the same in first class workable condition and maintaining the same in such condition and in purchasing new machinery and equipment for use in connection therewith and upon said mining claims and for the purchase of other mining claims. And appellant also expressly denied that it ever threatened or intended to sell any of the property involved in this suit, but that, on the contrary, it intended to, and had actually added thereto, and added to the value thereof, many times the amount of appellant's claim. (Tr. p. 151.)

In opposition to appellant's motion for a temporary receiver, appellee offered the affidavit of defendant E.

E. Powell, made September 4, 1917, in which he stated, among other things, that none of the property in possession of appellee was being worn or depreciated or that it would be rendered valueless for many years, but that, on the contrary, the same was and had been refitted and large additions were being made thereto at great expense, and he expressly denied that appellee had ever threatened to dispose of any of the property mentioned in the complaint herein. (Tr. p. 193.) He also denied that it was necessary to appoint a receiver, *pendente lite,* in order to preserve or protect the property mentioned in the complaint herein. (Tr. p. 194.)

Appellee also offered in opposition to said motion the affidavit of J. H. Miles, made September 4, 1917, in which he stated that he was a mining engineer by profession and a member of the American Institute of Mining Engineers. That for the past fourteen years he had made gold dredging a specialty, operating dredges in several different states. That in August, 1916, he was employed by appellee to go to Nome and make an examination of the property in controversy, and that in January, 1917, he was employed as general superintendent to take charge of the operations of appellee's property in Alaska. He stated that he arrived in Nome April 16, 1917, and immediately took charge of the property of appellee company. That this property consisted of placer mining claims, a power plant, two dredges, the hull of another dredge, certain

buildings in Nome, automobiles, miscellaneous mining machinery and equipment. Mr. Miles further stated in this affidavit that when he took charge of this property the power plant was badly out of repair and wholly unfit for operation. That since he had taken charge of the property the power plant had been completely and thoroughly overhauled and repaired and was now in good operating condition. That appellee had spent in such overhauling and repairing more than $3,000,000. He also stated that by overhauling and repairing the power plant he had reduced the daily consumption of oil in generating electricity from 65 barrels to 26 barrels and that the power plant in its then condition was worth not less than $40,000. (Tr. pp. 201-3.) Mr. Miles further, on oath, stated, that when he took charge of the properties in question, the Bourbon Creek dredge was badly run down and out of repair and unfit for operation and could not be economically operated. That the screen was unfit for use and that he had removed such screen and replaced it with a screen of modern type; also placed upon said dredge a new conveyor belt and replaced worn-out pieces in the winch of said dredge, and generally overhauled it at an expense of about $24,000.00. That this dredge was, at the time he made his affidavit, in first class condition and of a value of not less than $125,000.00 and could not be duplicated for less than that amount. (Tr. p. 203.) Mr. Miles further stated in his affidavit

that the dredge on Wonder Creek was sunk when he took charge of these properties and was a total wreck, and, outside of some of the electrical machinery, pumps and a small amount of timber, said dredge was of no value except as scrap and that all parts of such dredge had been preserved by and were then in the possession of appellee. (Tr. p. 204.) He further stated that the Flat Creek dredge had been purchased by appellee from one Ewing, and when purchased was of a value not to exceed $40,000.00. That the hull was too small for the type of machinery to be installed and that the same had to be reconstructed and enlarged. That appellee had purchased machinery to be installed in this dredge hull and the same had been installed, and the dredge was then completed and actively operated, and that appellee in purchasing, transporting and installing machinery thereon had expended the sum of about $100,000.00, and that since the purchase of such machinery prices thereof had advanced to such an extent that the dredge was then of a value of $200,000, and could not be duplicated for a less amount.

Mr. Miles further stated that the fourth dredge situated on Holyoke Creek was purchased by appellee from one Greenberg, and then consisted of a hull of a value of about $40,000.00. That appellee had purchased machinery to install in this dredge and had reconstructed the hull thereof and was then installing the machinery therein. That appellee had expended

about the sum of $115,000.00 in the reconstruction of the hull and machinery to be installed therein, and that the dredge would be completed and ready for operation in about thirty days from that date, and that when completed the dredge would be worth not less than $200,000 and could not be duplicated for less than that amount. (Tr. p. 205.) Mr. Miles further stated that since he took charge of the appellee's property he had established a camp on Flat Creek which cost not less than $3,000.00. That since the affiant was made appellee's general superintendent for carrying on its operations in the Nome District, the Flat Creek dredge and the Bourbon Creek dredge were the only dredges operated by appellee; that they had been operated for only a few days and no gold had been cleaned up from either of such dredges at that time, and that no active mining had been done by appellee since Mr. Miles became its general superintendent, except the operation of these two dredges for a few days. And he further stated that the property of appellee had not been, and was not being materially impaired, but that on the contrary, the value thereof had been materially enhanced by reason of the repairs and improvements made thereon. (Tr. pp. 205-206.)

Appellee also offered in opposition to said motion, the affidavit of H.S. Thompson, its auditor and assistant treasurer (made August 15, 1917), which corroborated in every particular the affidavit of General Superin-

tendent Miles. Mr. Thompson stated that at the time this affidavit was made, which was nearly three weeks before the affidavit of Mr. Miles was made, appellee had actually paid out for machinery for dredge No. 3, known as the Flat Creek dredge, the sum of $51,500.00, besides about $10,000 freight thereon. That appellee had at that time actually paid for machinery for dredge No. 4, known as the Greenberg dredge, the sum of $74,300.00, exclusive of freight charges. (Tr. pp. 208-209.) Mr. Thompson further stated that in addition to these amounts, appellee had expended up to that time in making improvements upon the property in question, the sum of $60,000.00, but that up to that time appellee had not done any actual mining or extracted any placer gold from any placer mining claim owned by it or held under lease or option by it. (Tr. p. 210). He further stated that appellee was organized with a capital stock of $10,000,000, of which at least 3,781,000 shares of the par value of $1.00 each had been actually issued and that this stock was on the New York market and a large number of shares were there bought and sold daily and the stock had a market value at the last report for the month of July, 1917, of 75c per share. (Tr. pp. 210-211.)

Appellee also offered another affidavit of H. S. Thompson, made September 4, 1917, in which he stated that since the making of his prior affidavit, appellee had continued, at great expense, to finish, repair, recon-

struct and equip dredges Nos. 2 and 3, and that the same were then in actual operation, as was also the power plant, but that dredge No. 4 was not then completed. (Tr. pp. 211-212.)

None of the statements made in these affidavits and offered by appellee, was denied in any way by appellant upon the hearing of the motion for a temporary receiver; it therefore stood admitted that since the opening of the mining season in 1917 up to the time of the hearing on appellant's motion, appellee had expended in improving its machinery, power plant and property, upwards of $245,000, nearly eight times the amount of appellant's alleged claim, but had not taken a dollar of gold out of any of the mining claims, and, because of the lateness of the season appellee would necessarily be unable to mine very much of the property involved in this suit before the close of the mining season, or before this case could be tried after the opening of the season in 1918.

From Exhibit "A" attached to the complaint herein it will be seen (Tr. pp. 27-28), that the mining claims held by appellee, upon which appellant seeks to establish a lien for the payment of its alleged claim, cover many hundreds of acres of mining ground in the Nome mining district. In the nature of things it will take years to dredge all of this ground, especially as work can be done, as the court knows, during only a

short period each summer, and there is no claim that appellee can or intends to mine these claims in any other way than by the use of these dredges. If these claims contain any gold whatever, appellee could not obtain more than a small fraction thereof before this case can be tried on the merits, and, therefore, there is not the slightest danger or possibility of the mining claims being wasted or depreciated in value to any appreciable extent before such trial can be had.

As to the personal property, the showing made by appellee is that it has taken these wrecked and almost valueless dredges and the depreciated power plant and, by the expenditure of nearly a quarter million of dollars, together with the increase in value of machinery, has made them worth at least $568,000.00.

But appellant argues that whatever the value of the real and personal property in question, it is subject to mortgages of about $400,000. The facts concerning these mortgages as they appear in the record are as follows:

The Nome Mining Company held a prior mortgage for $100,000.00 upon the property covered by the Thatcher and Sloan mortgages. This mortgage was in favor of one Lawrence Darr, trustee, and Mr. Powell in his deposition taken by appellant and offered in evidence by it upon the hearing of this motion, testified that this mortgage had been paid, which was not denied.

His explanation of how this payment was made was that the preferred stockholders of the Nome Mining Company, who controlled this mortgage and had a right to cancel the same, were to take 3,500 shares of stock in the Nome Holding Company in payment of this mortgage, and that these 3,500 shares had been left with a Mr. Reed for delivery to these Nome Mining Company stockholders for that purpose. (Tr. pp. 131-132.) This $100,000 mortgage to the Nome Mining Company, therefore, whether satisfied of record or not, is no longer a lien upon the property in question, and does not depreciate the value of this property for the purpose of satisfying appellant's claim therefrom if it should prevail in this action.

Another mortgage which appellant claims affects the value of this property as against its alleged claim, is a mortgage of $50,000 to the Banker's Trust Company of New York, made December 31, 1907, but Mr. Powell testified that this mortgage had been paid, although he thought it still remained unsatisfied of record. (Tr. p. 131.) There was no evidence offered by appellant to dispute this statement of Mr. Powell, and the deed to appellee company was not made subject to this mortgage, showing that the parties to that deed considered the mortgage paid. (Tr. p. 174.) Another mortgage which appellant claims affects the value of this property, so far as its alleged claim is concerned, is a mortgage for $35,000 to one Greenberg; but this

mortgage, Mr. Powell testified, covered only the property purchased by appellee from Mr. Greenberg, and that property is not involved in this suit, as it never belonged to the Nome Consolidated Dredging Company, nor could appellant possibly secure a lien thereon in this suit. Therefore, this mortgage does not in any way affect the value of the property which would be subject to any claim appellant would have. (Tr. pp. 131-132.)

The other mortgage referred to by appellant is a mortgage given by the Nome Holding Company to defendant E. E. Powell as trustee, to secure the sum of $200,000.00. This mortgage was given as a part of the transaction when Mr. Powell turned over the property bid in by him at the execution sale under the Thatcher and Darling mortgages to the Nome Holding Company, and was intended to secure in part the claims of creditors theretofore secured by the Thatcher and Darling mortgages. (Tr. p. 116). Of course, if the Thatcher and Darling mortgages were void, then this mortgage given to secure a part of the same indebtedness would also be void and for that reason would not affect the value of the property so far as appellant's claim is concerned. On the other hand, if this mortgage is valid as against appellant's claim, then the Thatcher and Darling mortgages were valid, and the foreclosure was valid and appellant has no right to a lien upon the property in any event.

It will therefore be seen that appellee holds more than half a million dollars worth of personal property besides several hundred acres of mining property, the value of which does not appear, except that it can be judged from the fact that appellee company was organized with a capital of $10,000,000, and has already spent more than a quarter million of dollars in repairing machinery and equipment to mine this property; and all this property, so far as appellant's claim is concerned, is free from any valid encumbrance and is being carefully preserved and improved and would be available to pay appellant's claim if it should prevail in this action.

If there was no necessity for the appointment of a receiver to hold possession of the property until the case can be tried next summer, before any further mining of consequence can be done, then certainly the court will not deprive appellee of possession of its property, whether or not appellant is likely to succeed upon the trial. What difference does it make, so far as appellant is concerned, whether appellee or a receiver holds possession of the property prior to a trial and judgment upon the merits, so long as appellant can then obtain satisfaction of whatever judgment it may obtain? But it would make a great difference to appellee if a receiver was appointed for its property before it had an opportunity to try out the issues as to fraud, the bona fides of the mortgages which are the

basis of its title to the property, the question of the bona fides of its purchase of the property, and all the other issues raised by the pleadings in this case.

To appoint a receiver for this property would destroy appellee's credit; make it impossible for it to care for and prepare its property for mining operations next season, and force it to lose all of next season's mining, as a penalty for refusing, before trial, to pay appellant's alleged claim, which it denies, and does not owe in any event, and denies the right of appellant to enforce the alleged claim against its property. Certainly there is no law which makes it obligatory upon the court to thus injure appellee, at the request of a party who would lose nothing if appellee is permitted to retain such possession.

It would seem to us in the face of this record and such a showing, which appellant did not and could not meet upon the hearing of its motion, that it was the height of presumption to ask a court to appoint a temporary receiver, to hold this class of property over a winter season in Alaska, when the property could not be used or depreciated, merely for the purpose of preserving it for the satisfaction of an alleged claim of a little over $30,000, the existence of which was denied and the right to enforce which is strenuously contested. We believe it would have been an act of such gross abuse of discretion on the part of the trial court

to have taken the possession of this property away from appellee and placed it in the hands of a temporary receiver prior to trial, that this court would not have hesitated in reversing such an order, although it rarely interferes with the action of the trial court in these matters.

This is especially true if either or all of the mortgages above referred to are existing liens on the property, as neither of the mortgagees therein is a party to this action. The court will not interfere with the possession of the mortgagor, at the instance of a third party, where the mortgagee is not a party to the suit, as such interference would endanger the mortgagee's security, entitle him to foreclose, and in effect deprive him of possession without his having had a hearing or opportunity to protect his interest.

THE TWO MORTGAGES FORECLOSED WERE BONA FIDE.

While we feel confident this court will not, on this appeal, consider any other questions in this case, than those already argued by us, nevertheless, as appellant has argued the other questions at such length, basing its argument upon incorrect assumptions as to what the record shows, we will discuss these questions to some extent, so that the court will see appellant has

no such clear, strong equities as it would have the court believe.

Appellant alleges and claims that the Thatcher and Sloan mortgages were without consideration, and therefore void; at least, that whatever actual indebtedness of the bank was secured by the Thatcher mortgage was paid by the mortgagor, Nome Consolidated Dredging Co., prior to the foreclosure; but this argument is wholly unsupported by the record, which, in fact, conclusively shows that each mortgage was given to secure bona fide debts of the mortgagor, no part of which had been paid when the mortgages were foreclosed. In fact, appellant's allegations and statements that the notes secured by these mortgages were "spurious," and without consideration, are contradicted by its allegations and argument that they were given to *prefer* the persons secured, over other creditors and stockholders of the mortgagor. There could be no *preference*, if there was no debt; it would be a case of *fraud* alone, not of preference.

But the record fully answers appellant's contention on this question, for it shows in detail the consideration for each note secured by these mortgages.

Appellant alleged the execution of the Thatcher mortgage for $25,000 by defendant E. E. Powell as Vice-President and General Manager of the defendant Nome Consolidated Dredging Co. That of the 37 notes

evidencing the $25,000 secured by this mortgage, seven purported to have been delivered to the Alaska Banking & Safe Deposit Co., of which corporation Thatcher, the trustee mortgagee, was then manager and principal officer. That sixteen of the notes, aggregating $7,017.24, purported to be delivered to the Nome Consolidated Dredging Co., mortgagor; seven of the notes, aggregating $3,500, purported to be delivered to defendant M. W. Newton; two of the notes, aggregating $2,000 purported to be delivered to the defendant Louis Eisenlohr; four of the notes, aggregating $2,000, purported to be delivered to the defendant E. L. Webster, and the other note, purported to be delivered to the defendant J. M. Sloan. And appellant alleged that in truth and in fact all of the notes were delivered to and held by the defendant E. E. Powell for certain fraudulent purposes thereafter alleged. It further alleged that the Alaska Banking & Safe Deposit Company was paid in full by the defendant Powell, as General Manager of the defendant Nome Consolidated Dredging Co., from sums due to the bank and secured by this mortgage, and that at the time of the foreclosure of this mortgage the bank had no interest whatever in the foreclosure proceedings. (Tr. pp. 5 and 6.)

Appellee, in its answer, admitted the execution of the Thatcher mortgage, and that the 37 notes secured thereby were delivered to the respective persons or

parties to whom appellant alleged they were purported to have been delivered, except that the Sloan note was delivered to one J. W. Alford. But appelllee expressly denied that any of the notes were delivered to or held by the defendant Powell for any purpose or purposes alleged or referred to in the complaint; but it admitted that long after the execution and delivery of the mortgage notes and after default therein, the notes were delivered to defendant Powell, as trustee for the respective owners and holders thereof, for the sole purpose of procuring a foreclosure of the mortgage. Appellee expressly denied that the Nome Consolidated Dredging Co., acting through defendant Powell, or otherwise, ever paid the Alaska Banking & Safe Deposit Co., or any owner or holder of either of said promissory notes, any money, sum or amount whatsoever on account thereof, or of the indebtedness evidenced by the promissory notes or secured by said mortgage, either as alleged in the complaint, or otherwise; and it also expressly denied that the indebtedness to the bank, as evidenced by either or all of the notes, or secured by the mortgage, was at the time of the foreclosure of the mortgage paid in whole, or in part. But it admitted that prior to such foreclosure, the notes owned and held by the bank were sold by it for value, and were delivered to and held by the defendant Powell as trustee for the purchaser or purchasers thereof, and

that the bank had no interest in the notes at the time of the foreclosure proceedings (Tr. pp. 145, 146).

Appellant further alleged the execution of the Sloan mortgage for $200,000 by the defendant Nome Consolidated Dredging Co., acting through the defendant E. E. Powell as its Vice-President and General Manager; and that this mortgage was executed with the intent to defraud the creditors of the mortgagor, particularly this appellant. Appellant alleged that of the 70 notes secured by this mortgage, four were pretended to be delivered to defendant Eisenlohr, 14 were pretended to be delivered to defendant Newton, and the remainder were pretended to be delivered to defendant Alaska Dredging Co., which was officered, owned and controlled by the defendant Powell. Appellant further alleged that none of these notes was ever delivered, but that they were at all times spurious and worthless, and were held and kept in the possession of defendant Powell to further his plan, scheme and conspiracy to defraud appellant (Tr. pp. 6 and 7).

Appellee in its answer admitted the execution of the Sloan mortgage, but expressly denied that this mortgage or the notes issued and secured thereby were made, executed or delivered with any intent to hinder, delay or defraud the creditors of the mortgagor or the appellant. It admitted the delivery of the four notes to defendant Eisenlohr and of the 14 notes to defendant

Newton, and of the remainder of the 70 notes to the defendant Alaska Dredging Co. And appellee expressly denied that said notes were not delivered to these parties or that the same or either of them were spurious or worthless, or that the same were kept in possession of defendant Powell for the purpose of defrauding appellant or any person, firm or corporation, or in pursuance to or in furtherance of any plan, scheme or conspiracy to defraud (Tr. pp. 146, 147).

Appellant did not offer any evidence upon the hearing of its motion for a receiver, to support its allegation that any or all of these notes were spurious, or paid prior to the foreclosure; except as it seeks to draw such inference from the depositions of defendants George D. Schofield and E. E. Powell. These depositions were given in a suit by said Schofield against said Powell, to recover for legal services as Powell's attorney. In order to prove the value of his services, Schofield testified that he had suggested and prepared a mortgage, before the execution of the two in question. He declined to answer a direct question as to whether or not the proposed mortgage was fictitious (Tr. pp. 109-110), but did say it was intended to eliminate certain stockholders "unless they did certain things" (Tr. p. 110). These "certain things" clearly appeared to be the furnishing of their proportion of needed working capital, as Schofield urged in his let-

ter of November 20, 1914 (Tr. p. 48 et seq.) written after the execution of the two mortgages.

Mr. Powell in his deposition of September 5, 1917 (Tr. pp. 115-143) testified as to some of the indebtedness secured by these two mortgages; and there is not the slightest ground for the claim that any evidence offered by appellant even tended to show the mortgages were without any or full consideration.

On the other hand, defendant Powell, in his affidavit of September 4, 1917, filed by appellee in opposition to the motion for a receiver, went into detail as to how these two mortgages came to be executed, the various debts secured by each, and what was done with each note (Tr. pp. 180-189, 194-196); and he expressly stated that each mortgage was given to secure existing bona fide debts, or money then advanced.

Appellee also offered the affidavits of Henry L. McCoy (Tr. pp. 212-213); of Mahlon H. Newton (Tr. pp. 214-215); of R. G. Cunningham (Tr. pp. 216-217); of E. L. Webster (Tr. pp. 217-218); of J. V. Sheldon (Tr. pp. 219-221); and of G. J. Lomen (Tr. pp. 222-223), all corroborating defendant Powell as to the consideration of various of these notes secured by these mortgages.

From this showing the court must find that these two mortgages were given to secure bona fide debts owing by the mortgagor. Whether or not the mort-

gages were given with the intent of having them foreclosed if the stockholders did not pay the indebtedness secured by the mortgages, and thereby securing title to the property, the mortgages were not, in any event, "spurious" or void for want of full consideration; nor would such an intent make the mortgages void. Appellant not only failed to "clearly" show upon the hearing of its motion, that the mortgages were void for this reason, but the evidence upon the hearing conclusively showed the contrary.

Appellant recognizes its failure in this respect for it does not argue this question, but bases its claim that the mortgages were void as to it, on the ground of "Fraud in preferring the officers and stockholders as against appellant and other stockholders of the insolvent corporation" (Brief p. 33), although its argument abounds in charges of actual fraud on the part of the defendant Powell and "his fellow conspirators." However, appellant does not point out any evidence even tending to show such actual fraud, but it appears to think that by repetition of its unsupported charges, it can turn suspicion and surmise into proof, and thereby raise a prejudice which will aid its legal contention that the mortgages were void as an unlawful preference.

The simple facts are that at the time of the execution of these two mortgages, the Nome Consolidated

Dredging Co. owned considerable money, and it needed more money to take care of part of this indebtedness, and especially for working capital to enable it to repair and operate its dredges. Some of this indebtedness was owing to general creditors, and most of it was owing to certain of its stockholders and directors. These stockholders and directors wanted and were entitled to security for their debts, and they were under no obligation to furnish more money for the benefit of the other stockholders. In order to secure the debts due these stockholders and directors, as well as to secure other creditors, and to secure some cash which the company needed, these two mortgages were executed and recorded. The bank, which was advancing new money at that time, was not willing to have its security included in a large mortgage, so the $25,000, to Mr. Thatcher, as trustee, was executed and recorded, securing the bank's advance of $10,182.79, and certain other creditors; and the $200,000 mortgage was executed and recorded later to secure the other indebtedness (Tr. p. 143).

Whether or not appellant held notes of the Nome Consolidated Dredging Company at that time as alleged in its complaint, at any rate, according to its own allegations any indebtedness on account of these notes was then denied by the Nome Consolidated Dredging Company, and, according to the complaint, it was not until nearly two years later that judgment was ren-

dered in appellant's favor, establishing such indebtedness. This is appellant's own statement of the matter, but appellee denies all the allegations relative to this alleged indebtedness, and it confidently expects to be able to sustain such denial upon the trial.

In any event, appellant had no established debt against the Nome Consolidated Dredging Co. at that time, and, so far as appears from the record here, these mortgages secured all the indebtedness of the mortgagor, except such as it was able to pay either out of moneys on hand or that obtained at that time from the bank.

The Nome Consolidated Dredging Co. was then a going concern, having property of considerable value (Tr. pp. 49-54, 189), but it owed considerable money, mostly to certain of its own stockholders and directors, and it needed more working capital (Tr. p. 189). In these circumstances, these mortgages were given to secure certain of its indebtedness, and to secure additional funds, and, so far as this record shows, no one except appellant, either creditor or stockholder, has ever complained because of the mortgages, on the subsequent foreclosure thereof.

Later, the stockholders were notified by defendant Schofield (Tr. pp. 48-54) that the property had been mortgaged, and that it would be sold unless funds were raised to meet the indebtedness and for working

capital. This not having been done, the mortgages were foreclosed the following summer, and the property sold, as the mortgagees had a right to do; and thereafter the property, which was bid in at the foreclosure sale by Mr. Powell, as trustee for the creditors secured, was turned over to the Nome Holding Company, which took title for the equitable owners under the sale.

Appellant complains because the foreclosure decree permitted Mr. Powell, as trustee, to bid the amount of the notes held by him and secured by the mortgages. This was not only proper, but necessary to protect all parties interested; otherwise, the property might have been sacrificed to the loss of the creditors, but with no benefit to either the mortgagor or any of its stockholders or creditors, if any other creditors then existed; for Mr. Powell, as trustee holder of the notes, would have been entitled to all proceeds of the sale up to the amount of the notes. Certainly, neither appellant nor any other person has any complaint on this account. Nor was any other person prevented from bidding at the sale, except that he could not obtain the property for less than these creditors were willing to bid for it. Nor was there any other bid, nor was Mr. Lindeberg prevented from bidding if he wished to do so, which he did not, as explained by Mr. Powell in his affidavit (Tr. p. 196).

There is absolutely nothing in the record to justify

any charge of fraud in anything which took place relative to the giving or foreclosure of these mortgages, either as to appellant or any other person, stockholder or creditor; and appellant is the only one that has ever complained. Whether or not appellant is entitled to have these mortgages, and the foreclosure thereof set aside, on the ground that they were void as to it as a preference to stockholders or directors, is another question entirely. But they certainly cannot be set aside as being fraudulent, either for want of consideration or because executed pursuant to an alleged fraudulent scheme and conspiracy, under the record upon this appeal.

Appellant recognizes the correctness of this contention, and contents itself with repeating its charge of fraud and conspiracy, assuming its mere allegations and assertions to be sufficient proof, in spite of the specific denials in appellee's answer, and the affidavits it offered denying in detail all charges of fraud, and affirmatively showing the bona fides of the entire transaction; and appellant now relies upon its contention that the mortgages were void as a preference to stockholders and directors over an alleged creditor.

We, therefore, contend that the record here shows conclusively that these two mortgages were in fact and in law bona fide; but in any event that the court cannot find the contrary from the record, and there-

fore, the order appealed from cannot be reversed upon this ground.

THE MORTGAGES NOT VOID AS A PREFERENCE.

As we have said, we do not think the Court will consider this legal question upon this appeal, because it is neither necessary nor proper to do so. If the individual defendants in this action, as stockholders and directors of the Nome Consolidated Dredging Company, had no legal right to secure their debts, as against appellant, they are personally liable to appellant in this action, to the extent of the property thereby secured by them, and appellant prays for a personal judgment against these defendants on that ground. But these individuals are not interested in this appeal, nor parties thereto, nor before this court at this time. This Court will not, therefore, adjudicate their rights or liabilities in the premises, in their absence and before trial, where only the question of necessity for the appointment of a receiver, pendente lite, is involved.

But we believe the law in this jurisdiction is, or will be held to be, that these stockholders and directors had a clear, legal right to secure themselves, as against appellant, under the facts appearing here.

Appellee denies appellant's alleged indebtedness. What answer the other defendants have made or may make concerning this alleged indebtedness, does not appear in the record here. But in any event, when these two mortgages were given, any indebtedness appellant claimed was in dispute, and it admits this was not settled until nearly two years later. Certainly these stockholders and directors were not bound to forego security for their own claims, until the controversy with appellant was settled; nor waive any defense the company had or claimed to such alleged indebtedness, in order to be able to secure themselves. Nor were they required to throw the company in the hands of a receiver or bankruptcy to secure protection for their claims.

If these stockholders and directors, being bona fide creditors of the Nome Consolidated Dredging Company, secured their debts, with the knowledge, consent and approval of the other stockholders, which must be presumed as none are shown to have complained or objected, and without injury to any creditor whose claim was admitted, which must also be presumed, as none have complained, and if such secured stockholders and directors afterwards acquired title to the property mortgaged, and then conveyed the same, but long afterwards appellant established a disputed claim against the Nome Consolidated Dredging Company, certainly these stockholders and creditors

cannot be held liable to appellant on the ground of having obtained an unlawful preference over appellant; much less can appellant set aside subsequent transfers of the property, and take the possession of such property from a transferee, pending suit, where no necessity for doing so is shown.

No authority cited by appellant in its brief holds that a mortgage given under such circumstances as appear in this case, is void as to a creditor whose claim is disputed, and not adjudicated until years after the execution of the mortgage. It will be remembered in this connection that appellant does not allege, nor does the record show, that appellant secured a judgment for the full amount of the claim made by it and disputed by the Nome Consolidated Dredging Company. For aught that appears, there may have been a substantial reduction of that claim, even assuming, for the purpose of the argument only, that appellant's allegations as to its indebtedness are true.

But aside from these considerations, when this question comes properly before this court, after a trial, so that all the facts and parties are before the court, we believe this court will follow the rule sustained by the weight of authority, that a corporation, like an individual, may prefer one creditor over another, even though the preferred creditor be a stockholder or director; and that the only prohibition under the trust

fund doctrine is that stockholders, *as such,* shall not be entitled to anything until creditors are paid.

7 Ruling Case Law, pp. 755-759, and cases cited, especially in Note 15, p. 758.

However, this is a "moot question" in this case at this time, before the questions of the solvency of the Nome Consolidated Dredging Company when the mortgages were made, the bona fides of the debts secured by the mortgages, the existence of appellant's alleged debt, and other questions are tried and determined and all the parties to such dispute, and to be affected by the decision of these questions, are before the court.

APPELLEE A BONA FIDE PURCHASER, FOR VALUE, WITHOUT NOTICE.

We do not believe the court will pass upon this question upon this appeal, but, as appellant has discussed this question at length, as one of its three questions of fact and law, we will point out the record bearing on the question, and state our position as to the law.

Appellant alleges that the formation of appellee corporation, was one of the steps in the deep laid scheme, plan and conspiracy to defraud, which it claims existed, and that the property in question was conveyed to appellee in pursuance thereof, which purchased

with full knowledge and notice of the same (Tr. pp. 12-14).

Appellee expressly denies all the allegations of fraud (Tr. p. 149), and it denied all the allegations of notice or knowledge of any fraud, scheme or plan (Tr. pp. 150-151); and it affirmatively alleged that it was a bona fide purchaser of the property, for value and without notice "of any of the alleged acts, plans, schemes, purposes or intentions," etc. (Tr. pp. 152-158).

Appellant offered no evidence upon the hearing of its motion to show that appellee had any notice or knowledge of its alleged indebtedness, or of any of the alleged fraudulent acts, except as it seeks to charge it with legal notice, because some of appellee's present directors were parties to the alleged fraud and knew that a suit was pending on an alleged but disputed indebtedness from the Nome Consolidated Dredging Company to appellant. And appellant contends that appellee was not a purchaser for value because it gave some of its stock in payment for the property.

The only evidence in the record bearing upon these questions, is contained in the deposition of defendant E. E. Powell, given September 5, 1917 (Tr. pp. 115 et seq.), and in his affidavit of September 4, 1917 (Tr. pp. 180 et seq.).

Mr. Powell stated that after he had transferred the property to the Nome Holding Company, during

the winter of 1915-1916, he went east to see what he could do with the property; that he had numerous negotiations with Mr. Gayley, among others, now President of appellee company, which finally resulted in a proposition to sell the property to a new corporation to be organized. That thereafter, appellee was organized, and later the property was transferred by the Nome Holding Company to the new company, the Alaska Mines Corporation, appellee here, in exchange for 3,701,820 shares of its stock, out of 10,000,000 shares for which it was organized. Appellee was organized on June 9, 1916, and some time later in June or July, defendants Powell, Eisenlohr and Newton, together with Mr. Gayley, Mr. Crane, Mr. Livingston and Mr. Heckscher became its trustees. Mr. Powell testified that he acted for the Nome Holding Company in the negotiations for this sale of the property (Tr. pp. 124-125). He also testified that he and Mr. Newton were witnesses at the trial in the Philadelphia court.

It nowhere appeared that either of the other directors ever heard of appellant's alleged indebtedness, or that the four directors, other than the three who were alleged to have been parties to the alleged fraud, and were secured by the mortgages which were foreclosed, ever heard of such alleged fraud, or any alleged fraudulent act affecting the title to this prop-

erty, and appellant is forced to rely on constructive instead of actual notice to appellee.

The established rule is that notice to an officer of a corporation is not notice to the corporation, unless communicated to the officer while he is acting for the corporation either generally or with reference to the transaction to which the notice relates. Notice to one before he becomes an officer of a corporation is not notice to the corporation. Notice to an officer of a corporation while he is acting for himself or adversely to the corporation, is not notice to the corporation.

These rules are firmly established and are not disputed by appellant. We cite the court to a few of the great many authorities on this question.

> 10 Cyc. pp. 1054, 1058, 1061-1065.
> *Thompson on Corporations,* Vol. 4, secs. 5197, 5204-5209, 5214, 5220, 5221.

> "Where the interests of the officers or stockholders of a corporation are adverse to it, their knowledge of facts and circumstances affecting such interest will not be imputed to the corporation."
>
> *O. & C. R. Co. v. Gruibissich.* 206 Fed. (C. C. A. 9th Cir.) 577.

In the case of *Brennan et al. v. Emery-Bird-Thayer Dry Goods Co.,* 99 Fed. 971, it is held:

Notice given, before the organization of a corporation, to a person who afterwards becomes a stock-

holder and an officer or an agent of the corporation is not notice to the corporation; the Court says:

> "It appears that one Robinson had been in the employ of said copartnership firms as their agent, in charge of their shoe department, in a department store, and that he attended to making all the purchases of shoes for them, and that he had sustained the same relation to the corporation since its organization. The evidence also shows that not all of the persons who composed said copartnerships are directors or stockholders in the defendant corporation. I do not understand the law to be that any information or knowledge which said Robinson may have acquired in his capacity as agent for said copartnership is imputable to the defendant corporation. The foundation of the doctrine that knowledge of the agent is chargeable to the principal rests upon the proposition that such knowledge comes to him while acting within the line of his agency for the given principal; and, as it is his duty to advise his principal of facts and information pertaining to his office as agent, the law presumes that he performs his duty, and therefore, the further presumption arises that his principal obtained such information. Story, Ag. par 140; *Bank v. Lovitt*, 114 Mo. 525, 21 S. W. 825. With the dissolution of the copartnership the office of Robinson as its agent ceased. When the corporation was created this legal entity became a distinct existence. Any knowledge or notice which an agent may have received while acting for another party or association, or which any individual member of the corporation may have obtained prior to the constitution of the corporate body, most certainly would not, as a matter of law, by implication, be carried over and imputed to the corporation, simply because one or more of the members of a previously existing concern may have become officers or stockholders of the corporation, nor because such agent afterwards be-

came an agent for the corporation. Were the law otherwise, most serious and unjust consequences might be brought upon the corporate body. 'The notice must be given to the agent while the agency exists, and it must refer to business which comes within the scope of his authority.' *Anderson v. Volmer*, 83 Mo. 406. See also *National Waterworks Co. v. City of Kansas City* (C. C.) 78 Fed. 434, 435."

In the case of *Whittle v. Vanderbilt, M. & M. Co.*, 83 Fed. Rep. 48, the syllabus reads:

"1. The Trustees of a trust for complainant's benefit conveyed the property in violation of the provisions of the unrecorded trust instrument, to a corporation organized by them for that purpose only, and which issued to them in exchange nearly all its stock. In a suit to charge the trust on the land, held, that under Civ. Code Cal., Sec. 869, 2243, relating to purchases from trustees, the stock issued for the land constituted the corporation a purchaser for value."

"2. A corporation purchased land from two persons, who held the record title, and also owned most of the corporate stock. No one representing it, except one of the grantors, knew that it was affected by an unrecorded trust instrument. Held, that as he was dealing for his own interest, and adversely to the corporation, his knowledge was not to be imputed to it, and that it was a purchaser without notice, under Civ. Code Cal., Sections 869, 2243."

The Court said:

"Whether or not the Vanderbilt Mining & Milling Co. had knowledge or notice of complainant's claims is evidently an issue of fact, and I think squarely raised by the pleadings. Did the company, then, or not, have this knowledge or

notice? There is no proof whatever that Hazard or Godbe, who were two of the company's directors, knew anything about the contract between Samuel King and Joseph P. Taggart and James K. Patton. Nor is there any proof that Annie M. Taggart, also a director, knew of the terms or existence of said contract, while her answer specifically denies any knowledge on her part of the matter. Complainant's contention, therefore, that said company had such notice, is maintainable only on the theory that the knowledge of Patton and Chambers, the other directors, is imputable to the company. Numerous authorities are cited by complainant to the effect that notice to the agent of a corporation is notice to the corporation. *Phelps v. Mining Co.*, 49 Cal. 337; *Jefferson v. Hewitt*, 103 Cal. 629, 37 Pac. 638; *Donald v. Beal*, 57 Cal. 405. While this, unquestionably, is the general rule, yet it has no application where the officer or agent of the corporation deals with the corporation, for himself, personally. In such a case he is regarded as a stranger to the corporation, so far as concerns any uncommunicated knowledge which he may have in respect to the transaction." (Citing numerous cases.)

In *Dorr v. Life Ins. Co.*, 70 Amer. State Rep. 309, it is held:

A corporation cannot be charged with the knowledge of its president, when such knowledge was obtained before he became president, or when he was acting in his own interest and behalf. The Court said:

"Even if it should be held that notice or knowledge of the transaction between Dorr and plaintiff, whereby he secured the loan upon a promise to pledge the stock shares subscribed as collateral, could be material or effectual as to de-

fendant corporation, there are two good reasons why such notice or knowledge cannot be imputed to it. 1st. When the loan was made and the money obtained Dorr was not its president, for it had not then been organized; 2nd. Had he been president at the time, he was acting in his own interest and behalf. Under such circumstances the defendant corporation could not be charged with the knowledge of its presiding officer. *Bang v. Brett*, 62 Minn. 4."

In the case of *In re Senoia Duck Mills*, 193 Fed. 711, it was held:

"Where the vice-president of the alleged bankrupt corporation was not only acting for the corporation, but also for himself, in a matter with relation to the transfer of certain machinery to it in which his interest was adverse to that of the corporation, his knowledge of the fact that the purchase price of the machinery, which he and certain others were instrumental in selling to the corporation had not been fully paid by them, was not binding on the corporation so as to deprive it from occupying a position of a bona fide purchaser for value."

In the case of *First National Bank of Sheffield v. Tompkins*, 57 Fed. 20 (C. C. A. 5th Ct.) (1893) it was held:

"Where a bank acquires title to real estate by conveyance from its president, who held the land under a deed reciting full payment of the purchase money, and it has no actual knowledge that the purchase money was not in fact paid, it is an innocent purchaser without notice, and is not chargeable with constructive notice because of the knowledge of its president."

Pardee (Circuit Judge) in delivering the opinion of the court, cites the case of *Whalan v. McCreary,* 64 Ala. 319; *Barnes v. Gaslight Co.,* 27 N. J. Eq. 33-37; *Bank v. Cunningham,* 24 Pick. 270, and a large number of English cases and text writers. The court says:

> "As, when the bank bought the property, the record showed a perfect title in Woodson, with the purchase price fully paid, and as the bank had no actual notice of outstanding secret equities, and was not charged with constructive notice of any such equities because of any knowledge of Woodson, its president, of whom it acquired the property, it follows that the bank was an innocent purchaser without notice, and, as such, acquired the property divested of any vendor's lien which may have existed in favor of Tompkins as against Woodson."

Three cases are principally relied on by appellant to the point that the Alaska Mines Corporation had notice of its claim and the alleged fraud. The first is *Wilson Coal Co. v. U. S.,* 188 Fed. 545. This was a suit by the United States to annul a patent to coal lands alleged to have been obtained by fraud. The Wilson Coal Company acquired the lands from Helen Pack Wilson, who subscribed for the *entire* capital stock of the corporation except four shares necessary to qualify the other directors. Under these circumstances it was held that the corporation was in fact Helen Pack Wilson, so far as notice was concerned. Helen Pack Wilson donated back to the treasury cer-

tain shares which were afterwards sold to others, and it is of these stockholders Judge Gilbert said:

> "Those who subscribed to the stock of the new corporation and paid for the same must be held to stand in no better position than the person through whose original subscription their stock was subsequently acquired."

This case is founded on the case of *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, which establishes the doctrine that where *all* the incorporators who owned the entire capital stock of a corporation had notice of a fraud the corporation itself had notice.

The second case is *McCaskill v. United States*, 216 U. S. 504. This was a case brought by the United States to annul for fraud a patent to a homestead in Florida. The original patentee who had obtained the patent by fraud, sold it for $425 to McCaskill and his partners who had notice of the fraud. The corporation in question was organized to carry on and continue the business of the former partnership with the same, or practically the same, owners, and it was held on the authority of *Simmons Creek Coal Co. v. Doran* that the corporation thus organized had notice of the fraud.

The third case is *Lynn Timber Company v. United States*, 236 U. S. 577; this was also a suit by the United States to cancel a patent; the corporation in question was organized by one Smith, with 1,000 shares

of the value of $1.00 each; 998 of these shares were issued to Smith, one to his wife, and one to his attorney; Smith paid for the stock so issued with a conveyance of the lands. He did not record the conveyance until after the suit was commenced by the United States. Under these circumstances it was properly held that Smith was in reality the corporation, and that notice to Smith was notice to the corporation.

It appeared that certain parties after the organization of the corporation and the issuance of its stock, took some of the stock as security, but the court held that the corportaion could derive no new rights by reason thereof. Citing *Wilson Coal Co. v. U. S.*, 188 Fed. 545.

These cases have no application to the position of the Alaska Mines Corporation in the case at bar. It might be that under these authorities it would be held that the Nome Holding Company had notice of all matters which E. E. Powell had notice of, but when the property involved in this suit was sold and transferred by the Nome Holding Co. to the Alaska Mines Corporation, E. E. Powell was acting for the Nome Holding Company, and it did not receive in payment for this property its entire capital stock, but only 3,701,820 shares out of a total capitalization of 10,000,000 shares. There were seven members on the board of directors of the Alaska Mines Corporation, and four never at any

time were in any way connected with the Nome Consolidated Dredging Co. and cannot be presumed to have notice of the appellant's claim or any other facts which were within the actual or presumptive knowledge of Powell, Eisenlohr or Newton. More than 600,000 shares of the capital stock of the Alaska Mines Corporation were afterwards issued and sold, for value, and $250,000, and more, thus derived, has been spent in the betterment of the property a receiver for which the appellant now seeks.

We submit, therefore, that the record fails to show any notice to appellee, either of appellant's alleged claim, or of any alleged defect in the title to the property in question.

Only one authority is cited by appellant to the effect that a corporation can not be a bona fide purchaser for value when it only issued stock in payment of the property purchased. 2 Cook on Corporations, 764, is cited to this point, and the author gives as authority *Rogers v. New York, etc., L. Co.*, 23 N. E. 26. We have examined this case and can find nothing in it to support the statement of the text writer. There is ample authority to the effect that a corporation in purchasing property and issuing stock in payment therefor may be a bona fide purchaser, for value.

Whittle v. Vanderbilt M. & M. Co., 83 Fed. 48.
Wyeth v. Renz Bowles Co., 68 S. W. 625 (Ky.),

digested in 5 Amer. Digest Decennial Edition, 1172.

Thompson on Corporations, Sec. 5207.

"We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but we do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it can not be sold, transferred or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence. The case of *Curran v. State of Arkansas*, 15 How. 304, 307, and *Wood v. Dummer*, 3 Mason 308, gives no countenance to anything of the kind."

Fogg v. Blair, 133 U. S. 534.

We believe that the court must say, under the record, and authorities we have cited, that appellee was a bona fide purchaser for value, without notice, if this question is to be passed upon on this appeal; or at least, that the record is wholly insufficient to justify a holding to the contrary at this time.

NOTICE OF LIS PENDENS.

Appellant says that "Alaska has no statutory right of lis pendens against personal property;" and argues that, therefore, "There is no other way of

protecting appellant's rights there except by a receiver." (Brief p. 59.)

Appellee denies that it has any intention of disposing of this property. The best evidence of this is the fact that it is organized with a large capital stock, which is bought and sold on the open market, and it has already expended more than a quarter of a million dollars repairing and improving the property and getting ready for many years of mining operations on its claims. A notice of lis pendens would protect appellant as to the mining claims and the power plant, which are certainly worth many times appellant's alleged claim; and, in the nature of things, these large dredges could not be sold at Nome, separate from the mining claims. Therefore, for practical purposes, a notice of lispendens would give appellant ample protection, pending a trial of this case, if any is needed other than the financial responsibility of the defendants in the case, without tying up the property through a receiver.

CONCLUSION.

We have not undertaken to point out in the record the answer, by denial or explanation, to many of appellant's insinuations of fraud contained in its brief, for the reason that we do not believe the court will consider these matters have any bearing upon this

appeal. But if the court considers it proper or necessary to examine the entire record covering all of the questions raised or argued, it will readily see that every claim of fraud, or fraudulent act or purpose, made by appellant, was fully met, and denied or explained, by appellee upon the hearing of the motion for a receiver.

For instance, Mr. Powell in his affidavit of September 4, 1917, fully explained the annual statement of the Nome Consolidated Dredging Company for 1915, Exhibit "C" attached to the complaint (Tr. p. 192).

Again, the inference of fraud appellant seeks to draw from the fact that Mr. Powell bid in the property at the foreclosure sale for only about $27,000, is not justified, for the reason that the property was sold under execution for debts aggregating nearly $236,000 (Tr. p. 21), and was bid in for these creditors, who received nothing for their claims but the property. By bidding a small amount, these creditors saved very heavy Marshal's fees, which was the reason for the small bid (Tr. p. 199). So the inference of fraud sought to be drawn from the fact that the name of the payee was left blank in some of the notes secured by the $200,000 mortgage, is unwarranted, because a note in blank is payable to bearer, and Mr. Powell testified that he delivered each note to the party entitled thereto, who endorsed the same, and he simply filled in their respective names later before foreclosure.

Appellant states in its brief (p. 21) that "Powell is now the general manager of the Alaska Mines Corporation, with an annual salary of $6,500," and again on page 32, states that he "is its general manager at an annual salary of $6,500 per year." But on the very page of the transcript referred to be appellant, Mr. Powell testified that he *was not* and *never had been* general manager of appellee (Tr. p. 135).

There are so many such incorrect statements, and wholly unwarranted assumptions contained in appellant's brief that, to point them all out would extend this brief to an unreasonable and, we believe, unnecessary length; especially as they are all made for the purpose of making this court think that a gigantic scheme of fraud was planned and carried out, in the hope that by so dong the court will say that appellee's property should be tied up, and thereby force it to pay a claim which it does not owe, and never heard of before this suit was brought, and which it denies exists.

The court will take judicial notice of geographical and climatic conditions, and it knows that no mining operations could be carried on much after the order of the lower court appealed from was made, nor before a trial can be had of this case on the merits. By the time this appeal can be determined, in the ordinary course, and a mandate filed in Nome, the case can be tried. To reverse the order appealed from, therefore, would not

help appellant. It is clear, therefore, that the main purpose of this appeal is to try, by repeated assertons of fraud and conspiracy, to obscure the only material issue upon the appeal, and secure a ruling or some expression on other questions, which would influence the trial court upon the trial of the case on the merits. We are confident the court will not prejudge any question in this case, upon a record such as is before it; but will confine its opinion to the only questions here involved, namely, that of power to appoint a receiver, and necessity therefor; and we believe that on these questions it will be fully convinced that the order appealed from was not only justified, but the only order the court could have properly made upon the record before it.

Respectfully submitted,

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